No. 85-1658

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

FEDERAL COMMUNICATIONS COMMISSION
and
UNITED STATES OF AMERICA,
Appellants,
v.
FLORIDA POWER CORPORATION, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF AMICI CURIAE ARIZONA CABLE TELEVISION ASSOCIATION MID-AMERICA CABLE TELEVISION ASSOCIATION NEW ENGLAND CABLE TELEVISION ASSOCIATION PENNSYLVANIA CABLE TELEVISION ASSOCIATION

STUART F. FELDSTEIN
Counsel of Record
JONATHAN V. COHEN
FLEISCHMAN AND WALSH, P.C.
1725 N Street, N.W.
Washington, D.C. 20036
(202) 466-6250
Counsel for
Arizona Cable Television Association, Mid-America Cable Television Association, New England Cable Television Association and Pennsylvania Cable Television Association

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QUESTIONS PRESENTED

1. Does the regulation of rates for attachments to property dedicated to public utility service constitute a "taking" under the Constitution?

2. Does the Court's holding in *Loretto v. Teleprompter Manhattan CATV Corp.* compel the conclusion that a taking occurs when Congress empowers the FCC to determine whether rates charged cable television operators by public utilities for attachments to utility poles are just and reasonable?

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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INTEREST OF THE AMICI CURIAE

The *amici curiae* are trade associations which represent cable operators in their respective states or regions. Cable operators in Kansas, Missouri, Nebraska and Oklahoma are represented by the Mid-America Cable Televi-

sion Association. The New England Cable Television Association represents the interests of cable operators in Maine, Massachusetts, New Hampshire, Rhode Island and Vermont. In total, approximately 5.7 million cable subscribers are served by the cable systems represented by the *amici curiae*. The *amici curiae* are and have been parties to and/or interested in proceedings before the Federal Communications Commission (hereinafter "FCC" or "Commission") held pursuant to the statute held unconstitutional by the U.S. Court of Appeals for the Eleventh Circuit (hereinafter the "Eleventh Circuit") below.

Since cable operator members of the *amicus curiae* associations attach cable facilities to utility poles at rates established under the statutory guidelines at issue here, the *amici curiae* will be substantially affected by the outcome in this case.

Inasmuch as the Eleventh Circuit's decision, if allowed to stand, would contravene clear Supreme Court precedent, threaten the economic viability of cable communications services and disrupt the appropriate methods by which Congress regulates the economy, the *amici curiae* strongly urge the Court to review and reverse the decision of the Eleventh Circuit.[1]

STATEMENT OF THE CASE

As a matter of economic necessity and local environmental concern, cable television operators, who provide video programming to subscribers through coaxial cable or other transmission facilities, must generally attach these facilities to available space on already-existing utility poles owned by public utilities. Cable companies have, therefore, historically negotiated agreements with utility companies for the rental of space on their poles for an annual or other periodic fee. Thousands of such agree-

[1] In accordance with Rule 36 of the Court, this brief is being filed with the consent of all parties to this case. Letters of consent from the parties have been filed with the Clerk of the Court.

ments are currently in effect across the country. Due to the superior bargaining power enjoyed by the utilities because of their local monopoly over the means of distribution of cable television's product, these agreements were often contracts of adhesion containing exorbitantly high fees. As the FCC Office of Plans and Policy stated in an August 1977 staff report, "public utilities by virtue of their size and exclusive control over access to pole lines, are unquestionably in a position to extract monopoly rents from cable TV systems in the form of unreasonably high pole attachment rates." FCC Office of Plans and Policy, Staff Report (August 1977) at 34.

Since states generally had not asserted authority over utility policies in this area,[2] cable operators sought relief from the FCC. In 1977, however, the FCC concluded that it lacked the statutory authority to assert jurisdiction over pole attachment rates.[3] Subsequently, in 1978, Congress enacted Public Law No. 95-234, 92 Stat. 33, 35-36 (approved February 21, 1978) (hereinafter "the Pole Attachments Act"), 47 U.S.C. § 224, to "resolve this jurisdictional impasse, by creating within the FCC an administrative forum for the resolution of CATV pole attachment disputes and by prompting the several States, should they wish to involve themselves in these matters, to develop their own plans free of Federal prescriptions." [4]

The Pole Attachments Act directs that, unless a state regulates such matters and provides the FCC with a certification to that effect,[5] the FCC "shall regulate the rates, terms and conditions for pole attachments to provide that such rates, terms and conditions are just and

[2] S. Rep. 95-580, 95th Cong., 1st Sess. (1977), at 14.

[3] *California Water and Tel. Co.*, 64 F.C.C.2d 753, 758 (1977).

[4] S. Rep. 95-580, *supra*, at 14.

[5] 47 U.S.C. § 224(c).

reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms and conditions."[6] The statute provides guidelines for the FCC's determination of what rate would be "just and reasonable" in a specific case.[7] In assessing a utility's costs, the FCC has the discretion to adopt any rate of return sufficient to satisfy the utility's investment-backed expectations.[8] The FCC's decision in a pole attachment matter would be subject to judicial review in the normal course.

The legislative history of the Pole Attachment Act specifically states the justification for federal involvement in pole attachment disputes:

> Federal involvement in pole attachment matters will occur only where space on a utility pole has been designated and is actually being used for communications services by wire or cable. Thus, regardless of whether the owner or controller of the pole is an entity engaging in the provision of communications service by wire, if provision has been made for attachment of wire communications a communications nexus is established sufficient to justify, in a jurisdictional sense, the intervention of the Commission.
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> * * * *
>
> FCC regulation will occur only when a utility or CATV system invokes the powers conferred by [the Act] to hear and resolve complaints relating to the rates, terms and conditions of pole attachments. The Commission is not empowered to prescribe rates, terms and conditions for CATV pole attachments generally.[9]

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[6] 47 U.S.C. § 224(b)(1).

[7] 47 U.S.C. § 224(d).

[8] *See Alabama Power Co. v. FCC*, 773 F.2d 362, 372 (D.C. Cir. 1985).

[9] S. Rep. 95-580, *supra*, at 15.

Furthermore, it is beyond dispute that utility companies are under no obligation to make space on their poles available to cable operators:

> [The Act] does not vest within a CATV system operator a right of access to a utility pole, nor does [the Act] require a power company to dedicate a portion of its pole plant to communications use.[10]

Prior to the passage of the Pole Attachments Act, the cable television industry suffered having to lease space on utility poles at exorbitant, predatory prices.[11] Congress recognized that utilities, which enjoyed monopoly power only through a public trust, had been abusing this trust by thwarting the development of the cable communications marketplace.[12]

This case arises out of complaints filed with the FCC pursuant to the Pole Attachments Act by Teleprompter Corporation (the predecessor-in-interest to Group W Cable, Inc.) and Cox Cablevision Corporation. In each

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[10] *Id.* at 16.

[11] The abuse by the utility companies of their monopoly position and the anticompetitive efforts undertaken to stunt the growth of cable television are well documented. *See, e.g., General Telephone Co. of the Southwest v. United States*, 449 F.2d 846, 850-51 (5th Cir. 1971); *United Telephone Co. of Pennsylvania*, 40 F.C.C.2d 359, 361-68 (1973); *Better T.V. Inc. of Dutchess County, N.Y.*, 31 F.C.C.2d 939, 943-68 (1971); *TeleCable Corp.*, 19 F.C.C.2d 574, 578-91 (1969); H.R. Rep. 95-721, 95th Cong., 1st Sess. (1977), at 2-5.

[12] The Act's sponsor explained: "These utilities, however, have responded in traditional monopolistic fashion, offering cable operators 'take it or leave it' terms. Not only does this situation hamper the expansion of cable television service, but in at least one instance, it resulted in ongoing cable service being cut off to consumers . . . [C]onsumers now receiving cable television as well as consumers who desire access to this service in the future will benefit from this bill's attempt to protect them from the abusive monopoly power of the utilities." 123 Cong. Rec. 16694 (1977) (Statement of Rep. Wirth).

complaint, the cable operator argued that the contracted-for rate for pole space charged by Florida Power Corporation (hereinafter "Florida Power") exceeded the just and reasonable rate. In decisions on July 16, 1981 and March 8, 1982, the FCC determined that the just and reasonable rate for space on Florida Power's poles was, on the average, 73.8 percent below the contract rate. Florida Power's applications for review were denied by the FCC on September 28, 1984.

Florida Power appealed the FCC's ruling to the Eleventh Circuit, arguing that the FCC's rate determination deprived it of just compensation for the "taking" of its property. The Eleventh Circuit panel ruled that the Pole Attachments Act authorizes government-compelled permanent physical occupations of property, and thus effected a taking under the Fifth Amendment and this Court's decision in *Loretto v. Teleprompter CATV Corp.*, 458 U.S. 419 (1982). However, the Court of Appeals did not reach the question whether the rate set by the FCC was just and reasonable, concluding, *sua sponte*, that the determination of just compensation for a taking is "solely within the parameters of the judicial function" and may not be constitutionally delegated to the FCC. *Florida Power Corp. v. FCC*, 772 F.2d 1537, 1545 (11th Cir. 1985). The panel thus held that the Pole Attachments Act was unconstitutional.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

If the Eleventh Circuit decision declaring the Pole Attachments Act unconstitutional is allowed to stand, the ability of the Congress to regulate public utilities in the public interest would be undermined. Furthermore, a return to monopolistic, anticompetitive rates for pole attachments would impede the growth of the cable television industry and threaten the recently-expressed desire of Congress to "assure that cable communications provide

and are encouraged to provide the widest possible diversity of information sources and services to the public." [13]

The Eleventh Circuit also is in error in extending *Loretto*'s *per se* test for takings to public utility property. The use of such property is generally subject to restriction as the *quid pro quo* for the utility's government-mandated monopoly position. The Eleventh Circuit relied on grounds which ignore long standing decisions of this Court and which are plainly distinguishable from the instant case.

I. The Regulation of Rates for Attachments to Public Utility Property Does Not Constitute a Taking Under the Constitution.

Relying on the Court's decision in *Loretto*, the Eleventh Circuit held that the FCC's order setting the rate which Florida Power could charge for attachment to its poles amounted to a taking of its property. However, that holding ignores the utility's unique status as a government-created monopoly which operates under legislative and administrative restrictions regarding its operations and its economic performance. Utility rates are almost universally set by a government agency. Utilities are guaranteed a non-confiscatory rate of return on their investment, and they do not operate as strictly private enterprises in a free market economy. Thus, the principles applicable in *Loretto* are simply inapposite here. Regulation of utility rates for pole attachments cannot be viewed the same as government-required access to wholly private property.

A. *Restrictions on the use of public utility property are commonplace.*

For over a century, it has been axiomatic that governments may regulate businesses which are "affected with

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[13] 47 U.S.C.A. § 521(4) (West Supp. 1985).

a public interest."[14] As the Court in *Munn v. Illinois* stated:

> Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control.[15]

Public utility poles fall four square within this passage. This is especially so in the present context where a utility, under no compulsion to do so, makes space on its facilities available to a cable operator. The public, most particularly the cable-subscribing public, has an interest in such use, and government controls on the rates charged for such use are reasonable and consistent with a long line of cases upholding restrictions and requirements regarding the use of utility property.[16]

B. *Regulation of pole attachment rates does not result in economic loss to the utility.*

It might be possible to consider the regulation of rates for pole attachments to be a taking if an FCC-prescribed rate resulted in some economic loss to the utility. However, this is not the case. Pole attachment rate regula-

[14] *Munn v. Illinois*, 94 U.S. 113, 126 (1877).

[15] *Id.*

[16] Courts have on numerous occasions upheld requirements that utilities interconnect with other businesses and otherwise permit permanent physical occupation at regulated rates. *See* cases cited at note 24 of Jurisdictional Statement of Group W Cable, Inc., National Cable Television Association and Cox Cablevision Corporation in the instant case.

tion does not alter the return that a utility receives on its investment in poles. Generally, if a utility chooses not to lease space on its poles to cable operators, the utility's revenue requirement will be met by its general ratepayers. Although pole attachment fees serve to offset the amount required from general ratepayers to satisfy the utility's required rate of return, the fees collected from cable operators do not alter this rate of return.[17] Utilities lease space to cable operators on poles which are already dedicated to public use and as to which they are already guaranteed an authorized rate of return. The Pole Attachments Act therefore does not deprive utilities of revenue. It simply provides a mechanism by which, in the absence of state regulation, disputes as to the just and reasonable rates for pole attachments can be fairly resolved.

The Pole Attachments Act defines a range for just and reasonable rate determinations, the low end of which ensures the payment to the utilities of their incremental costs of providing pole attachments, while the high end of the range requires payment by cable operators of a share of the fully distributed cost of the pole plant. It is thus impossible for utilities to suffer an economic loss relating to the costs involved in the cable operator's placement of cable facilities on their poles. Moreover, as a practical matter, FCC resolutions of pole attachment disputes have generally focused on fully distributed costs, with the parties claiming varying shares as just and reasonable. Therefore, cable pole attachments not only do not cause economic loss to the utility, but in fact actually serve the utility's purpose in that they lower the revenue requirement to be satisfied by general ratepayers, allowing the utility to provide service at a lower cost to its consumers.

[17] Florida Power conceded this fact in its brief to the court below. Brief of Petitioner Florida Power Corp. before the Eleventh Circuit, at 14, 37-39 (Dec. 27, 1984).

C. *The Pole Attachments Act is ordinary regulation with regard to public utilities and was necessary in light of demonstrated abuse by utilities in this area.*

Passage of the Pole Attachments Act was considered necessary by Congress because of the demonstrated abuse by utility companies of their monopoly status and their position as cable television's only realistic distribution alternative,[18] because the FCC had found that it lacked the statutory authority to assert jurisdiction over pole attachment fees, and because most states had not asserted regulatory authority over these matters.[19]

Since utilities enjoy their monopoly status only through government fiat, it has long been recognized in the courts that they must accept regulatory constraints in return for this unique entitlement.[20] Conferring jurisdiction upon the FCC to resolve pole attachment disputes is simply another manifestation of the *quid pro quo* which utilities must accept for the absence of competition which they enjoy. The Pole Attachments Act is thus entirely

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[18] *See* H.R. Rep. 95-721, *supra*, at 2-5. *See also United Tel. Co. of Pennsylvania*, 40 F.C.C.2d 359, 361 (1973); *Manatee Cablevision. Inc.*, 22 F.C.C.2d 841, 849 (1970), *vacated as moot*, 35 F.C.C.2d 639 (1972); *Section 214 Certificates*, 21 F.C.C.2d 307, 316, *modified*, 22 F.C.C.2d 746 (1970), *aff'd sub nom. General Tel. Co. of the Southwest v. United States*, 449 F.2d 846 (5th Cir. 1971); *Tele-Cable Corp.*, 19 F.C.C.2d 574, 578-79, 587 (1969); *Radio Hanover Inc. v. United States*, 273 F.Supp. 709 (M.D. Pa. 1967).

[19] Even now, over eight years after passage of the Pole Attachments Act, only 15 states and the District of Columbia have certified that they are regulating in this area. *See* FCC Public Notice, Mimeo No. 4150, dated April 29, 1986.

[20] *See, e.g., FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) (upholding order setting utility rates under Natural Gas Act of 1938); *Munn, supra*, 94 U.S. at 132 (upholding regulated rates charged for grain elevator operators who "stand . . . in the very 'gateway of commerce' and take a toll from all who pass").

consistent with the legislative function as it relates to public utilities.

D. *The Pole Attachments Act falls short of a taking when evaluated under the Court's test for determining takings.*

The Court has consistently "eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and [has] relied instead on ad hoc, factual inquiries into the circumstances of each particular case." [21] The Court has identified three factors which it said hold "particular significance": (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action." [22]

The court below did not make an effort to analyze the Pole Attachments Act under the Court's test, instead attempting to fit the instant case into the "very narrow" holding of *Loretto*.[23] If the Eleventh Circuit had undertaken this essential task, it could not have avoided the conclusion that the Pole Attachments Act does not constitute a taking.

As discussed *supra*, it is impossible for rate regulation under the Pole Attachments Act to result in a negative economic impact on utility companies, which are guaranteed a certain authorized rate of return on investment. Even if the minimum just and reasonable compensation allowed under the Pole Attachments Act were set by the

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[21] *Connolly v. Pension Benefit Guaranty Corp.*, —— U.S. ——, 106 S.Ct. 1018, 1026 (1986), *citing Ruckelshaus v. Monsanto Corp.*, 467 U.S. 986, 1005 (1984).

[22] *Id., quoting Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). *See also PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82-83 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

[23] *Loretto, supra*, 419 U.S. at 441.

FCC, utility companies would still be compensated for all incremental costs of cable attachment. In actuality, the FCC generally requires cable operators to bear some share of the utility's fully distributed costs. Thus, utilities and their general ratepayers are benefited by cable attachment. Indeed, it stands to reason that utilities would not grant cable operators access to their poles in the first place if this were not so.

In view of the above, cable attachment engenders no cost to a utility company. Indeed, the pole continues to be owned by the utility; the utility can evict cable facilities if it needs the space occupied by those facilities or it can compel the cable operator to pay for a larger pole; and after cable tenancy is ended, the utility will still own the pole. Thus, regardless of the rate set by the FCC pursuant to the Pole Attachments Act, it cannot be seriously contended that regulation under the Pole Attachments Act interferes with any distinct investment-backed expectations of the utilities.

Finally, the character of the government action at issue here is not such as would compel a determination of a taking. As the Court has repeatedly stated:

> A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, *see, e.g., United States v. Causby*, 328 U.S. 256 (1946), than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.[24]

As shown *supra*, utilities are not in any way harmed economically by cable pole attachment. Likewise, no physical rights to the use of poles are denied utilities by regulation pursuant to the Pole Attachments Act. It is therefore difficult to understand how any claim of a

[24] *Loretto, supra*, 458 U.S. at 426; *Penn Central Transportation Co. v. New York City, supra*, 438 U.S. at 124. *See also* cases cited in *Connolly v. Pension Benefit Guaranty Corporation, supra*, 106 S.Ct. at 1026.

"taking" under these circumstances can be sustained. FCC regulation pursuant to the Pole Attachments Act does not "take" the use of property away from utilities, it merely provides a method of determining a fair price for cable operators' use of utility poles. Such regulation is consistent with well established Court precedent declining to find a taking.

II. The Court's Holding In Loretto Does Not Compel the Conclusion That The Pole Attachments Act Constitutes A Taking.

A. *The Eleventh Circuit's Reliance On The Court's Holding In Loretto Is Misplaced.*

The Eleventh Circuit held below that the Pole Attachments Act amounted to a government-authorized permanent physical occupation of public utility property and that this constituted an unconstitutional taking *per se* under *Loretto*.[25] The Eleventh Circuit was wrong on both counts. The facts of the instant case are plainly distinguishable in several significant ways from those of *Loretto*.

[25] The Eleventh Circuit also held that Congress may not constitutionally delegate authority to determine just compensation for a taking to an administrative agency. This determination must, according to the Eleventh Circuit, be made by a judicial body. *Amici curiae* herein assert that no taking whatsoever occurs under the Pole Attachments Act, so that the constitutionality of the Pole Attachments Act under the Just Compensation Clause would not be at issue. If the Court disagrees, *amici curiae* strongly urge the Court to reverse the Eleventh Circuit's determination on the constitutionality of the Pole Attachments Act. The instant case concerns not private property but property already dedicated to public use. As discussed *supra*, regulation of pole attachment rates, terms and conditions falls properly within the FCC's jurisdiction over wire communications, and relates to matters about which the FCC has a particular expertise. *See Alabama Power Co. v. FCC*, 773 F.2d 362, 367 n.8 (D.C. Cir. 1985). To allow the Eleventh Circuit's decision to stand would require the federal judiciary to become the ratemaker in countless pole attachment disputes, further clogging already crowded court calendars.

1. The Pole Attachments Act does not authorize "permanent" physical occupation of utility poles.

Unlike the circumstances existing in the *Loretto* case, there is nothing permanent about the occupation of poles by cable companies. Pole space leased to a cable operator is still controlled by the utility and can be reclaimed. In applying *Loretto*, the Eleventh Circuit failed to consider that the Court had found a *per se* taking because the permanent occupation authorized under the New York law deprives the property owner of the right to possession and control:

> First, the owner has no right to possess the occupied space himself, and also has no power to exclude the occupier from possession and use of the space. * * * Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but he can make no nonpossessory use of the property.[26]

Utilities retain the right to compel removal of cable facilities from poles should the space be needed for the utility's primary purpose. Virtually all attachment agreements provide that a cable operator must pay the entire cost of a larger replacement pole if, at any time, there is inadequate space to accommodate the utility's needs.

2. Unlike the state law challenged in Loretto, the Pole Attachments Act does not grant cable companies any attachment rights.

The contrast between the present case and *Loretto* is heightened upon consideration of the effect of the regulations at issue upon the individual pieces of property affected. In *Loretto*, an apartment building owner was compelled to permit a cable company to attach facilities to his building. N.Y. Exec. Law § 828(1) (McKinney Supp. 1981-1982). In contrast, under the Pole Attachments Act, if a utility company does not wish to permit cable access to a particular utility pole, it is under no requirement to do so. Similarly, if access has been granted and subsequently the space occupied by cable facilities is needed by the utility, cable facilities can be expelled. If a taller pole is needed to accommodate all uses, the cable operator can be required to bear the *entire* cost of the taller pole. However, if the utility does not wish to or cannot replace the pole with a larger one, cable facilities can be excluded entirely. The regulatory scheme dictated by the Pole Attachments Act comes into play only after a utility has made an independent decision to lease a cable operator access to its property, while the New York law at issue in *Loretto* clearly precluded such an independent decision by landlords.

[26] *Loretto, supra*, 458 U.S. at 435-36.

The Eleventh Circuit failed to weigh this key distinction in considering the "character of the government's action" under the Court's test for takings.[27] The right which appellees assert here—and which the Eleventh Circuit would grant—is the right to be free from necessary and ordinary regulation for the common good.[28]

Congress, recognizing the extortionate fees exacted by utilities while free from pole attachment rate regulation, acted to preserve the public interest by passing the Pole Attachments Act. The Act permits the FCC to review the terms of agreements voluntarily entered into by util-

[27] This is not surprising since, as noted *supra*, the court below failed even to employ the balancing test for takings, instead making a broad reading of the Court's "very narrow" holding in *Loretto*. *Loretto, supra*, 458 U.S. at 441.

[28] It bears noting that, on remand from *Loretto*, the New York Court of Appeals directed the State Commission on Cable Television to determine just compensation for the taking involved, specifically rejecting the argument that the U.S. Constitution prohibits such a determination by an administrative agency. *Loretto v. Teleprompter Manhattan CATV Corp.*, 58 N.Y.2d 143, 153, 446 N.E.2d 428, 459 N.Y.S.2d 743 (1983).

ity companies to ensure that they are fair to both parties. This is plainly distinguishable from the mandatory access law found to constitute a taking in *Loretto*.[29]

3. The property allegedly "taken" here is not private property, but is dedicated to public use.

The taking in *Loretto* involved the attachment of cable facilities to purely private property—an apartment building which was used by its owner as rental property. Thus, the interest of the public in the use of the subject property was not a consideration in *Loretto*.

The instant case, however, concerns ordinary regulation regarding the use of property dedicated to public use.[30] Ms Loretto's objection to undesired invasions upon her private property is precisely the concern which the Just Compensation Clause was intended to protect. This concern is substantially diluted here where regulated utilities claim that they should be free from regulation of the rates they charge to allow an additional set of wires to be strung from poles used precisely for that public purpose. The importance to this case of the nature of the property alleged to be taken cannot be overstated. Public utility plant is, by its very nature, subject to regulation and restrictions on use. Private property is far less so.[31]

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[29] In addition, under the law at issue in *Loretto*, landlords would have been required to remove their buildings from the rental market in order to regain the right to exclude cable facilities. The Pole Attachments Act does not prevent utilities from excluding cable facilities from poles, or requiring payment for taller poles, when the space is needed for the utility's primary service.

[30] Courts have long held that Congress may empower regulatory agencies to exercise their rate-making function to regulate the return on public utility plant. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 601 (1944).

[31] The extent to which private property *is* subject to regulation confirms that when a public interest is implicated, governments are permitted to regulate free from the constraints of the Just Compensation Clause. *See, e.g., Hilton Washington Corp. v. District of Columbia*, 777 F.2d 47 (D.C. Cir. 1985) (upholding regulation of a hotel taxicab stand in the face of a *Loretto*-based claim because the hotel was not compelled to establish the stand).

In sum, it is clear that the Eleventh Circuit's total reliance upon *Loretto* as controlling in this case was in error.

CONCLUSION

Principles repeatedly enunciated by the Court make clear that the regulatory scheme established by Congress for reviewing pole attachment fees does not constitute a taking under the Fifth Amendment to the Constitution. It merely empowers an expert agency to arbitrate disputes regarding the fairness of pole attachment rates, and preserves for the judicial branch the power of review of that agency's determination. This scheme of government regulation is natural and ordinary. A contrary result would disrupt economic legislation by Congress and clog the nation's courts by making the judiciary the initial arbiter of pole attachment disputes.

The Court should note probable jurisdiction and reverse the judgment of the Eleventh Circuit.

Respectfully submitted,

STUART F. FELDSTEIN
Counsel of Record
JONATHAN V. COHEN
FLEISCHMAN AND WALSH, P.C.
1725 N Street, N.W.
Washington, D.C. 20036
(202) 466-6250
Counsel for
Arizona Cable Television Association, Mid-America Cable Television Association, New England Cable Television Association and Pennsylvania Cable Television Association

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